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In The

Supreme Court of the United States

JEFFREY CHEEK AND ALVIN DOTY,

Petitioners,

v.

THE CITY OF EDWARDSVILLE, KANSAS; JOHN BROMAN; JENNIFER BURNETT; TIM KELLY; DOUG SPANGLER AND LLOYD BETH,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTION PRESENTED

The First Amendment precludes the State from conditioning public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression. In *Garcetti v. Ceballos*, 547 U.S. 410 (2007) this Court held that when a public employee speaks pursuant to his or her official duties their speech is not protected by the First Amendment. The narrow question presented by this case is:

Whether the First Amendment affords protection to speech by a law enforcement officer where the law enforcement officer communicates with an outside law enforcement agency, consistent with his official duties, concerning alleged criminal conduct by his superior officer and city officials of which the officer has personal knowledge due to his position as a law enforcement officer.

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STATEMENT

1. This matter arises out of the termination of Petitioners Jeffrey Cheek and Alvin Doty's employment with the Edwardsville, Kansas municipal police department. The district court granted summary judgment in favor of Respondents on Petitioners' claims under 42 U.S.C. § 1983 for alleged violations of their First Amendment rights. Pursuant to this Court's precedent in *Garcetti v. Ceballos*, 547 U.S. 410 (2007), the district court found that Petitioners' speech was made pursuant to their official duties as law enforcement officers and, therefore, was not constitutionally protected. The Tenth Circuit affirmed the judgment of the district court.

2. Petitioners Jeffrey Cheek and Alvin Doty were each employed as majors by the Edwardsville, Kansas police department. (App. 11-12). Doty had been employed as a police officer in the Edwardsville police department for approximately eleven years, holding a number of positions including detective. (App. 12). Petitioner Cheek was employed by the Edwardsville police department for four years and served as a uniformed officer as well as the narcotics officer. Petitioners were each promoted to the rank of major in 2004. (*Id.*).

As majors, Petitioner Doty oversaw the detectives in the Edwardsville police department and Petitioner Cheek oversaw the uniformed officers. (App. 14). Petitioner Cheek's job duties included training and mentoring the sergeants and reestablishing a

strong chain of command and accountability. (*Id.*). Petitioners could and did serve as the chief of police in his absence. (*Id.*).

In addition to their supervisory responsibilities, Petitioners continued to perform traditional law enforcement duties including conducting criminal investigations and making arrests as majors with the police department. (App. 14). Petitioners also would conduct internal affairs investigations of other police officers in the Edwardsville Police Department. (App. 14-15).

3. On occasions, Petitioners Doty and Cheek sought the assistance of and worked with outside law enforcement agencies if the City did not have the resources necessary to complete a criminal investigation. (App. 13). Petitioner Doty sought assistance from outside law enforcement agencies for polygraph examinations and on two occasions sought the assistance of the Federal Bureau of Investigation (FBI) in narcotics investigations. (*Id.*). Petitioners also worked with outside law enforcement agencies in relation to certain internal affairs investigations Petitioners were responsible for conducting. (App. 15).

While majors, Cheek and Doty went to the FBI and requested that the FBI conduct an investigation into allegations of illegal and improper conduct by Edwardsville Police Officer Sheila Rogoza that were outside the realm of an internal affairs investigation but more in the realm of criminal public corruption. (App. 15). Cheek and Doty provided information to

the FBI regarding the alleged illegal activities of Officer Rogoza, and cooperated with and assisted the FBI in relation to this investigation. (App. 15-16). Doty believed it was his official duty as a police officer and as a major with the Edwardsville police department to take the allegations concerning Officer Rogoza to the FBI. (App. 16).

Cheek and Doty also conducted an internal affairs investigation of Sergeant James Marble concerning allegations that Sergeant Marble interfered with the investigation involving Officer Rogoza. (App. 16). The assistance of an outside law enforcement agency again was solicited, and the Leawood, Kansas police department assisted Cheek and Doty in this internal affairs investigation. (*Id.*).

4. As recognized by Petitioner Doty, a police officer with knowledge of possible criminal conduct has a duty to report that conduct to someone so that it may be investigated. (App. 18). This duty to report criminal conduct includes official misconduct by another officer even if the potentially criminal conduct involves a superior officer. (*Id.*). Specifically, during his deposition, Petitioner Doty testified:

> Q: And so, as part of your duties as a police officer that worked for the Edwardsville Police Department for over 10 ½ years, if you knew official misconduct by a superior officer with the Edwardsville Police Department, you would take that information to whatever the appropriate authority might be; correct?

A: I would report that information, yes.

Q: When you find or the DUI case file was found and the citation was found in Chief Vaughan's desk, part of your official duties as major with the police department of Edwardsville, since it involves your superior officer [it is] to go to an outside law enforcement agency that can investigate that possible criminal conduct; correct?

A: Yes.

Q: And that is what you guys did; correct?

A: Yes.

(App. 18).

Petitioner Doty not only recognized the existence of these official duties as a police officer, he candidly admitted that he followed these duties when carrying out his employment as a police officer and major with the Edwardsville police department. (App. 18-19).

5. In late 2005 or early 2006, Cheek was present when a case file related to a driving under the influence charge (DUI case file) was discovered in Chief Vaughan's desk drawer by the secretary for the police department, Melynda Harbour. (App. 17). The case file had previously been reported as missing. (*Id.*). Cheek later learned that the case file Harbour discovered was the same DUI case file that had been previously reported as missing. (*Id.*). According to Petitioner Cheek, the DUI case file had all the

"writings of impropriety on it," and he believed something improper was going on. (*Id.*). Although the DUI ticket was generally outside the realm of internal affairs and involved possible public corruption, it was similar to the allegations and information against Officer Rogoza that Petitioners had taken to the FBI. (App. 15-17).

The discovery of the DUI ticket and the appearance of impropriety demanded that Cheek and Doty, as majors with the Edwardsville police department and as part of their official duties, report the discovery of the DUI ticket to the appropriate outside authorities for investigation. (App. 18). The Edwardsville police department standard operating procedure provides in relevant part:

> Complaints alleging improper police conduct, brutality or misconduct involving several personnel or supervisor personnel will be handled as an internal affairs matter and shall be investigated at the direction of the Chief of Police. . . . **If there is probable cause to believe that an employee has committed a criminal offense, the district attorney's office will be notified and an outside agency will be requested to assist in completing the investigation for the proper jurisdiction.** [Emphasis added.]

(App. 15).

Cheek and Doty had nowhere to go other than an outside law enforcement agency to request an

investigation of their superior officer, the chief of police. (App. 17-18). Cheek believed that the attorney general's office would be the appropriate agency for investigating possible corruption involving Chief Vaughan and the DUI case file. (App. 18).

6. In early January 2006, Sergeant Hammontree issued a speeding ticket to Councilman Tim Kelly's brother. (App. 19). That same day, Councilman Kelly mentioned the ticket to Sergeant Hammontree. (*Id.*). Later Councilman Kelly spoke to Chief Vaughan about how the speeding ticket could be reduced to a non-moving violation. (App. 19). Chief Vaughan later told Councilman Kelly that the ticket had been taken care of or fixed. (*Id.*). Sometime after his discussion with Councilman Kelly, Sergeant Hammontree checked on the status of the ticket and he could find no record of it with the Edwardsville municipal court. (*Id.*).

Sergeant Hammontree discussed this information with Petitioners – his immediate supervisors and superior officers in the police department. (App. 19). During a meeting in Petitioner Cheek's office at the police department, Petitioners shared with Hammontree, a subordinate officer, that Chief Vaughan had discussed in a meeting with Petitioners, among others, another incident involving Councilman Tim Kelly where councilman Kelly had allegedly attempted to influence a cocaine arrest. (*Id.*). Petitioners showed Hammontree a memorandum prepared by Chief Vaughan to Doug Spangler, then the city commissioner, regarding the incident. (App. 22). Petitioners and Sergeant Hammontree also discussed

the apparent failure to process DUI tickets as well as what outside law enforcement agency would be the appropriate agency to investigate the disappearance of traffic and DUI citations, interference with internal affairs investigations and interference with arrests. (App. 19-20).

Petitioner Cheek and Hammontree discussed the district attorney's office – the outside agency identified in the police department's standard operating procedure for investigating potential criminal conduct by police officers – as a potential outside agency to conduct the investigation. (App. 20). However, they dismissed the district attorney's office because of perceived political influence by Edwardsville city officials on the office. (*Id.*). They decided not to contact the FBI or other federal agencies because they did not believe that the allegations involved a federal crime. (*Id.*). Ultimately, they decided that the appropriate agency to contact, if necessary, was the Kansas Attorney General's office. (*Id.*).

In early 2006, the Edwardsville Fraternal Order of Police (FOP) sent a letter addressed to the Mayor, city council and city administrator regarding allegations of potentially illegal or improper conduct by city officials and/or employees. (App. 20). In February, the FOP sent a letter to the Kansas Attorney General's office requesting an investigation of the allegations of official misconduct. (*Id.*). John Henre and Terry Hammontree, both officers with the police department and members of the FOP, traveled to Topeka, Kansas on February 13, 2006 and requested that the

attorney general's office investigate the allegations of official misconduct. (App. 20-21).

7. In February 2006, the attorney general's office began conducting an investigation into allegations of potentially illegal and improper conduct by Edwardsville employees and city officials. (App. 21). In late February or early March, Tom Williams, a representative from the attorney general's office, met Cheek at the Edwardsville police department. (*Id.*). This meeting was not very long. At the time Cheek was acting as the chief of police as Chief Vaughan was on a leave of absence. Prior to his termination, Cheek provided information to investigators about the missing DUI case. (App. 21). Prior to giving inquisition testimony in June 2006, Cheek also provided information to the attorney general's office regarding Councilman Robert Lane having work done on his house for free, Councilman Tim Kelly asking Chief Vaughan to influence a cocaine charge, and Councilman Kelly apparently having Vaughan fix a speeding ticket issued to Kelly's brother. (*Id.*). Doty also met with investigators from the attorney general's office on five to six occasions and provided similar information to the investigators.

Doty felt that as a major with the Edwardsville police department that he and any other police officer had a duty to cooperate in the investigation by the Kansas Attorney General's office. (App. 34).

8. In April 2006, Cheek was suspended from the Edwardsville police department following several

months of tumultuous events. (App. 23). These events included Petitioner Cheek making a racially charged statement to an African American detainee. (*Id.*). Cheek admitted to telling the detainee that they still hang horse thieves in Kansas and that law was still on the books. Cheek also verbally attacked the city administrator, Doug Spangler, prior to a specially called city council meeting. (App. 23). Cheek's verbal assault on the city administrator was such that city council members present for the specially called meeting could hear Petitioner Cheek threatening and yelling at the city manager from behind a closed office door. The city council voted 3 to 1 to terminate Cheek's employment following this altercation.

Alvin Doty's employment with the police department was terminated in September 2006 following repeated acts of insubordination and refusal to follow orders given by new chief of police Lloyd Beth. (App. 23). Doty's insubordination included refusing to patrol areas of Edwardsville, failing to return the keys to his patrol car as ordered, and refusing to wear the appropriate police uniform. (App. 23). The city council voted unanimously to terminate Doty's employment.

Cheek and Doty each filed suit under 42 U.S.C. § 1983 alleging that the City terminated their employment in retaliation for their involvement in the Kansas Attorney General's investigation. In granting summary judgment in favor of Respondents, the district court stated:

> The court cannot envision any view of the facts in which these instances of speech [by Cheek and Doty] would not be considered to have reasonably contributed to or facilitated their performance of their duties to investigate criminal conduct and perform IA [internal affairs] investigations.

(App. 32). In so stating, the district court recognized that Petitioner Doty specifically testified that they had a duty to cooperate in the investigation and that, although their speech involved an unusual predicament of reporting alleged misconduct by fellow law enforcement officers and the misconduct of city employees and officers, their speech owed its existence to the activities the City paid Petitioners to perform – investigating and reporting criminal conduct and performing internal affairs investigations. (*Id.*). The Tenth Circuit Court of Appeals affirmed, finding that Petitioners speech was made pursuant to their official duties. (App. 73-74).

9. Petitioners misrepresent the record to this Court in two fundamental and key respects. First, Petitioners state: "No police department investigation was begun. Cheek and Doty neither assembled evidence nor interviewed possible witnesses." (Pet. 4). In support of this purported fact Petitioners cite to the order and judgment of the Tenth Circuit found at page 4 of the appendix. However, a review of the opinion reveals that this purported fact was not found by the district court or the court of appeals. Rather, the record reveals that the reference is merely the

Tenth Circuit summarizing Petitioners' argument on appeal that they spoke as witnesses because "they argue that they did not initiate an investigation, interview witnesses or otherwise gather evidence." This argument both on appeal and now does not find support in the record. Cheek testified at his deposition:

> Q: So you would agree with me that it would have been unacceptable or inappropriate for you to conduct an investigation of Chief Vaughan?
>
> A: No. I said it would be unacceptable for us to complete the whole investigation. . . . It would be less than proper for us to, on just something hearsay, to go to the Attorney General's office and say, hey, we hear these rumors. . . . If there was enough indication that would come to me to say, hey, your superiors are doing something wrong, while it's a terribly uncomfortable situation, I would have to determine whether there is enough for an investigation to be warranted through some type of initial fact-finding myself to even know if it's worthwhile.
>
> At that point, then I would ask somebody from the outside to do what we don't do, which is public corruption, which is either FBI, KBI or Attorney General, and in this case, Doug Spangler used to brag about knowing people in the KBI. Really wasn't a great option

> just to go to the KBI and say, hey, one of your friends might be up to something . . .

This testimony by Cheek was specifically cited in the district court's opinion finding Petitioners spoke pursuant to their official duties. (App. 17).

Petitioners further misrepresent the record by indicating that state investigators "interviewed numerous witnesses including Cheek, Doty and Harbour." (Pet. 5). Again this purported fact cannot be reconciled with the record before the Court. It is undisputed that Cheek spoke with investigators from the attorney general's office at the Edwardsville police department during one brief meeting in February/March 2006. Who was responsible for initiating this conversation, Cheek or the outside investigator, is unknown. This fleeting conversation hardly qualifies as a witness interview as suggested by Petitioners. Although Cheek subsequently spoke with investigators on other occasions, again, who was responsible for initiating these conversations and the specific substance and purpose of the conversations are not revealed in the record. The circumstances of Doty's conversations with outside investigators are equally as vague. What is revealed by the record is that these communications occurred pursuant to Petitioners' official duties as police officers and majors with the Edwardsville, Kansas police department.

REASONS FOR DENYING THE PETITION

Summary

Although public employees do not surrender all their First Amendment rights by reason of their public employment, when a citizen enters government service, the citizen must, by necessity, accept certain limitations on his or her freedom of speech. *See Waters v. Churchhill*, 511 U.S. 661, 671 (1994). Therefore, in analyzing claims under the First Amendment, courts much reach a balance between the interests of the employee, as a citizen, to comment on matters of public concern, and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees. *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will City*, 391 U.S. 563, 568 (1968).

Historically, the analysis of claims brought by public employees for alleged violation of their First Amendment rights was a twofold inquiry: (1) did the employee speak as a citizen; and (2) did the employee's speech address a matter of public concern. *Pickering*, 391 U.S. at 574; *Connick v. Myers*, 461 U.S. 138, 147 (1983). This Court altered the traditional analysis required in First Amendment free speech cases brought by public employees in *Garcetti v. Ceballos*, 547 U.S. 410 (2006). *Garcetti* recognized that, although a public employee does not surrender all of his First Amendment rights by reason of their public employment, speech made pursuant to the employee's professional duties is not constitutionally

protected. 547 U.S. at 421. In so holding, this Court recognized that the First Amendment is not offended where a public employer regulates speech made pursuant to an employee's official duties. *Id.* at 426. A number of circuit courts have recognized that the "official duties" analysis of *Garcetti* added an additional inquiry to First Amendment analysis articulated in *Pickering* and *Connick*. *See e.g. Green v. Bd. Of County Comm'rs*, 472 F.3d 794, 798 (10th Cir. 2007); *Williams v. Dallas Indep. Sch. Dist.*, 480 F.3d 689 (5th Cir. 2007); *Mills v. City of Evansville, Indiana*, 452 F.3d 646 (7th Cir. 2006).

However, Petitioners urge this Court to accept this matter for review because, generally, Petitioners spoke to an outside investigative agency as witnesses and the Tenth Circuit's application of *Garcetti* conflicts with the approach taken by other circuits. The Petition should be denied pursuant to *Garcetti* as the record before the district court and the circuit court established that Petitioners spoke pursuant to their official duties as police officers and majors with the Edwardsville, Kansas police department.

Petitioner Doty candidly admitted that the majors had an official duty to cooperate and provide information in relation to the attorney general's investigation. The communications at issue were communications that were expected to be performed and in fact had been performed by Petitioners on similar occasions. Moreover, the subject matter of the communications by Petitioners was consistent with and related to their recognized and undisputed job

duties – investigating crime, conducting internal affairs investigations, supervising other officers and making arrests. Free speech is not implicated where a public employee is simply performing the job duties they were expected to perform. *Garcetti*, 547 U.S. 410.

I. Petitioners' speech was made pursuant to their official duties as police officers and majors.

As this Court noted, "Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen." *Garcetti*, 547 U.S. at 421. When employees make statements pursuant to these professional responsibilities, the employee is not speaking as a citizen for First Amendment purposes and their speech is not protected. *Id.* While *Garcetti* did not articulate a comprehensive framework for defining the scope of an employee's duties, this Court did provide lower courts with some guidance in determining whether an employee's speech is made pursuant to his or her official duties. The inquiry is a "practical one" that should focus on "the duties an employee is actually expected to perform." *Id.* at 424-25.

Petitioners deviate from the practical inquiry recognized by this Court in *Garcetti*, and instead focus on narrow and misleading arguments unsupported by the record to urge this Court to revisit the

official duties doctrine of *Garcetti*. Petitioners contend that their speech in this case is entitled to protection because Petitioners simply spoke as witnesses in the investigation conducted by the Kansas Attorney General's office into allegations of malfeasance by city officials.

Contrary to Petitioners' position, however, this case does not require or call for this Court to clarify its decision in *Garcetti* and outline the comprehensive framework that was absent for determining whether speech was made to an employee's official duties. A practical inquiry of the record before the trial court and court of appeals leaves little question that the speech at issue was made pursuant to Petitioners' official duties as police officers and majors with the Edwardsville, Kansas police department. This practical inquiry is a fact intensive one and deference to the district court's factual determinations is appropriate. *Foraker v. Cheffinch*, 501 F.3d 231, 240-41 (3rd Cir. 2007); *Freitag v. Ayers*, 468 F.3d 528 (9th Cir. 2006).

Both the district court as well as the Tenth Circuit determined that based upon the record before the court, Petitioners spoke pursuant to their official duties as police officers and majors. The most conclusive evidence establishing that Petitioners spoke pursuant to their official duties is their own uncontroverted testimony. During his deposition, Doty repeatedly and unequivocally testified that, as a major and police officer, he and Cheek had an official duty to cooperate in the investigation being conducted by the Kansas Attorney General's office. Doty

candidly admitted that this duty applied to all police officers and that the police officers had a duty to provide information to the attorney general's investigators if approached. Doty further testified that this official duty extended to the DUI case file discovered in Chief Vaughan's desk. Doty testified that following the discovery of the case file, the majors had an official duty to take that information to an outside law enforcement agency to be investigated. That is exactly what they did in this case.

Reporting the discovery of the DUI case file and other allegations of impropriety to an outside investigative agency was also consistent with the Edwardsville police department standard operating procedure. Petitioners, as police officers, were obligated to follow, if not to the letter, the spirit of these procedures. The standard operating procedure provided that information concerning criminal conduct of an officer was to be reported to the district attorney's office for investigation. It was, and is, undisputed that Cheek and Doty were responsible for conducting internal affairs investigations pursuant to the standard operating procedure. Considering that Chief Vaughan was apparently involved in the disappearance of the speeding ticket, it is axiomatic that allegations of his own impropriety could not be taken to him for an internal affairs investigation. Additionally, Petitioners did not feel they could take the allegations to the district attorney's office as dictated in the standard operating procedure because of city manager Douglas

Spangler's perceived influence on the district attorney's office.

Based upon the nature of the allegations and perceived influence of city officials, Petitioners decided it would be prudent not to specifically follow the standard operating procedure. Rather, in conjunction with Sergeant Hammontree, a subordinate officer, they determined an alternative course of action based upon the circumstances and facts known to Petitioners and made consistent with their official duties and the spirit of the standard operating procedures of the police department. As noted by the district court: "[Petitioners'] discussions with Sergeant Hammontree were geared toward determining how best to handle the alleged improprieties from a professional standpoint." Petitioners' uncertainty or confusion as to how to handle the situation, as it did not fall squarely into the confines of the standard operating procedure, does not establish that they were not acting pursuant to their official duties as police officers. *See Morales v. Jones*, 494 F.3d 590, 597 (7th Cir. 2007).

The careful consideration given by Petitioners as to the appropriate agency to investigate the allegations of misconduct by both the chief of police as well as elected officials evidences that these decisions were made as part of their official duties as police officers and superior officers providing guidance to a subordinate officer. Petitioner Cheek was Sergeant Hammontree's superior officer and was responsible for mentoring the sergeants. Petitioners' conversations with Sergeant Hammontree occurred in

Petitioner Cheek's office at the police department. This conversation was well within their official duties as Sergeant Hammontree's supervisory officers. *See id.* (holding that communications between police officers regarding allegations that superior officers had harbored a felon were not protected by the First Amendment as it occurred as a result of their official duties). There is little question Cheek and Doty were acting pursuant to and consistent with their official duties.

In an attempt to shroud their communications with constitutional protections and remove them from the ambit of their official duties, Petitioners in conclusory fashion contend they were merely witnesses in the attorney general's investigation – no different from witnesses in any other criminal investigation. Petitioners' conclusory statement ignores the overwhelming evidence in the record and their own candid admissions revealing that Petitioners had engaged in similar speech on other occasions in their official capacity as police officers and majors, and considered their speech in this case to have occurred pursuant to their official duties.

The Petition is devoid of any substantive discussion regarding Doty's testimony that he: (1) spoke pursuant to and consistent with his official duty as a police officer and major, and (2) police officers with the Edwardsville police department had an official duty to cooperate and provide information in relation to the attorney general's investigation. Petitioners also fail to substantively distinguish their actions and

communications in relation to the attorney general's investigation from their traditional job duties as police officers – investigating crime, making arrests and working with outside law enforcement agencies. It is noteworthy that Petitioners devote a single paragraph of their Petition (p. 19) to the discussion of their official duties. Rather than focus on their admitted job duties, Petitioners argue that they spoke as witnesses because they did not perform any investigation into the allegations or interview witnesses – admittedly traditional official duties of a police officer. The record belies this contention.

Cheek testified during his deposition that he would not have taken allegations to the attorney general's office without conducting some type of fact finding investigation. The record establishes that Petitioners did in fact conduct such a fact finding investigation, albeit limited in scope.

It is uncontroverted Cheek and Doty discussed with Chief Vaughan allegations that Councilman Timothy Kelly allegedly attempted to influence a cocaine arrest. Petitioners later discussed with Sergeant Hammontree the disappearance of a speeding ticket issued to Councilman Kelly's brother. Petitioners then chose to discuss with Sergeant Hammontree, a subordinate officer, the allegation that Councilman Kelly had also allegedly attempted to influence a cocaine arrest, and showed him a memorandum regarding that incident that had somehow come into their possession. During these discussions, Petitioners discussed with Sergeant Hammontree possible

outside agencies to investigate this potentially criminal conduct. They determined that the appropriate outside law enforcement agency to investigate these issues was the attorney general's office.

This conduct by Petitioners was consistent with the fact finding Cheek described as an appropriate response to allegations involving his superior officer, and certainly an ordinary citizen would not have the means and could not conduct such a fact finding investigation.

The fact that Petitioners' investigation was limited in scope also does not remove Petitioners' communications from the scope of their official duties. A full blown investigation by the Edwardsville police department was neither possible nor warranted. First, Petitioners' superior officer was directly involved in the issues involving the disappearance of the DUI ticket and alleged interference with a traffic ticket. Petitioners testified that they had no place to go but an outside law enforcement agency because the allegations involved the potentially illegal conduct of their superior officer. Cheek further testified that when the DUI ticket was discovered in Chief Vaughan's desk, it had all the writing of impropriety on it, and Cheek believed that something improper was going on even without any additional investigation. Doty admitted it was necessary to take the matter to an outside agency for investigation immediately upon finding the DUI case file. It was necessary to take it to an outside agency because that is what their official duties demanded of them. Petitioners

had engaged in similar conduct, in their official capacity as law enforcement officers and majors, on at least two other occasions.

The uncontroverted evidence before the district court was that Petitioners had engaged in similar activities when conducting an internal affairs investigation of other officers that revealed potentially illegal conduct. This included working with and sharing information with an outside investigative agency (the Federal Bureau of Investigation) about possible public corruption by a fellow officer, and interviewing a fellow officer about possible criminal conduct – similar to Petitioners' conversations with Sergeant Hammontree. Petitioners' conduct in communicating with the Kansas Attorney General's investigator concerning possible criminal conduct embraced the work and tasks Petitioners were paid to perform and had performed in other instances.

Moreover, unlike ordinary citizen witnesses, Petitioners learned certain information they ultimately provided to the attorney general's office as a direct result of their positions as majors. These matters included the citation issued to Councilman Kelly's brother, the alleged interference with a narcotics arrest, conversations and memorandum by Chief Vaughan regarding this incident, and the discovery of the DUI case file in Chief Vaughan's desk. This was all information that was not generally known or available to the public, and was available to Petitioners as a result of their official positions within the police department. "There is no relevant analogue to

speech by citizens who are not government employees," as Petitioners' official positions allowed them access to information they otherwise would not have been privy to, and as a result, their disclosure of this information implicated their official job duties. *Garcetti*, 547 U.S. at 424. *See Tamayo v. Blagojevich*, 526 F.3d 1074, 1092 (7th Cir. 2008) (recognizing that reporting misconduct against an agency over which one has general supervisory responsibility is part of the duties of such an office).

The fact that Petitioner Cheek was acting pursuant to his official duties, whether implied or explicit, when he met with and provided information to the attorney general's investigators is further buttressed by the fact that Petitioner Cheek was the acting chief of police at the time he met the investigator in the police department. Chief Vaughan took a leave of absence from the police department around the time the Attorney General's investigation began in mid-February 2006. Cheek's meeting with investigators occurred at the police department in late February or early March. At that time, Cheek was the acting chief of police. One of the functions of the chief of police is to direct any investigation of allegations of police misconduct. When Cheek met with investigators, Cheek was simply performing one of his job duties as acting chief of police – working with the outside law enforcement agency that was conducting an investigation involving alleged police misconduct. In taking the practical view of an employee's job duties as instructed by *Garcetti*, circuit courts have

recognized that an employee with significant and comprehensive responsibility for policy formation and implementation certainly has a greater responsibility to speak to a wider audience on behalf of the government unit. *Tamayo*, 526 F.3d at 1092.

The parallels between *Garcetti* and this matter support denying the Petition. In *Garcetti*, Ceballos, a calendar deputy in the district attorney's office, was approached by a defense attorney about inaccuracies in an affidavit that had been used to obtain critical search warrants. Ceballos investigated and determined there were inaccuracies that were unresolved after consultation with the affiant. He informed his supervisors, and prepared a memorandum concerning the inaccuracies and recommending dismissal of the case. Ceballos also met with the affiant and his supervisors to discuss the case. After being called as a defense witness, Ceballos was reassigned, transferred to another courthouse and denied promotion. Ceballos sued claiming violation of his First Amendment rights. It was undisputed that Ceballos' actions were carried out pursuant to his official duties as a calendar clerk.

In rejecting Ceballos' First Amendment claims, the Court noted the controlling factor was Ceballos' job duties as to whether he spoke as a citizen or pursuant to his public employment. *Garcetti*, 547 U.S. at 421.

> Ceballos did not act as a citizen when he went about conducting his daily professional

> activities, such as supervising attorneys, investigating charges, and preparing filings. . . . When he went to work and performed the tasks he was paid to perform, Ceballos acted as a government employee. The fact that his duties sometimes required him to speak or write does not mean his supervisors were prohibited from evaluating his performance.

Garcetti, 547 U.S. at 422.

Similarly, Petitioners did not act as citizens when they investigated possible criminal conduct by the chief of police and council members, interviewed or spoke with their subordinate officers regarding the subordinate officers' knowledge of any such criminal activity, determined the appropriate outside agency to take the allegations of criminal conduct to pursuant to the department's standard operating procedure, and then shared what information they possessed about the criminal conduct with that investigative agency. The actions by Petitioners were not "peripheral irregular or even unique activities" as suggested by Petitioners. Rather, the record reveals that they were similar to activities Petitioners performed on other occasions in their official capacities.

Admittedly, Cheek and Doty's speech with outside investigators was not an enumerated job duty of a police officer with the Edwardsville police department. However, this Court specifically rejected such a bright line test in determining whether a public employee spoke pursuant to his official duties. *Garcetti*, 547 U.S. at 424. As recognized by Petitioners, speech

falls outside the First Amendment if it embraces the job duties the employee was hired to perform. *Id.* at 421. A practical inquiry focuses not on enumerated job duties, but rather on "the duties an employee is actually expected to perform" and does perform. *Id.* at 424-25.

The fact that Petitioners may have exceeded their formal job descriptions does not mean that their actions were not within the scope of their duties. *Foraker v. Chaffinch*, 501 F.3d 231, 242 (3rd Cir. 2007). The record establishes that Petitioners' communications in this case were the type of duties Cheek and Doty were expected to and did in fact perform as police officers and majors with the police department.

Petitioners further attempt to distinguish their conversations with outside investigators by likening these conversations to testimonial statements that are traditionally afforded constitutional protection. Petitioners' reliance is misplaced.

Traditionally, truthful testimony is protected under the First Amendment and *Garcetti* did not alter the protection afforded to such testimony. *See Reilly v. City of Atlantic City*, 532 F.3d 216 (3rd Cir. 2008). Here, however, Petitioners were not placed under oath when they spoke with investigators. Doty never provided sworn testimony in the investigation and Cheek did not testify as a witness at an inquisition, hearing or trial prior to the termination of his employment. The circuit decisions holding that sworn,

truthful testimony is protected are unavailing in this case.

Moreover, the information provided by Cheek and Doty to investigators was not accurate or apparently truthful. A key factor in recognizing that testimony is protected is its truthfulness. *Reilly*, 532 F.3d at 230. Petitioners contend, in a footnote, that the "thrust of the information was correct" simply because Councilman Robert Lane had received free carpeting related to the failure to prosecute the DUI ticket discovered in Chief Vaughan's desk. However, the allegations against Councilman Kelly regarding the alleged influencing of a cocaine arrest and interference with a traffic citation proved to lack veracity. Cheek and Doty provided information to representatives of the attorney general's office despite the apparent falsity of this information. The fact that this information was false undermines the fact that it should be afforded constitutional protections.

Public employees, such as law enforcement officers, often occupy trusted positions in our society. *Garcetti*, 547 U.S. at 419. Public "employers have a heightened interest in controlling speech made by employees in his or her official capacity. Official communications have official consequences. . . . Supervisors must ensure that their employee's official communications are accurate, demonstrate sound judgment and promote the employer's mission." *Id.* at 422-23.

Here, Cheek and Doty occupied positions in the Edwardsville police department that placed them in a supervisory role over other officers. In this role, they discussed information with a subordinate officer, Sergeant Hammontree, regarding an elected city official (Councilman Kelly) that ultimately proved false. Cheek and Doty then discussed this false information with an outside investigative agency. They discussed this information with both Sergeant Hammontree as well as representatives from the attorney general's office in their official capacity as majors. Cheek discussed this information while acting as the chief of police at the police department. Under *Garcetti* and its progeny, certainly the City of Edwardsville and its elected officials have an interest in ensuring that employees holding supervisory positions do not lie with impunity or repeat unsupported and baseless allegations simply because they disagree with the policies established by the elected officials. Such irresponsible and reckless communications by public employees are not protected by the First Amendment, and the Petition should be denied.

II. Communications with outside investigative agencies are not entitled to greater constitutional protection or scrutiny than other communications by public employees.

Petitioners cleverly and ingeniously craft the position that their communications are entitled to

constitutional protection or greater scrutiny under the First Amendment because their communications were with an outside investigative agency. Petitioners contend that the Tenth Circuit Court of Appeals substituted and then rejected an inferior First Amendment argument for the one actually presented by Petitioners. However, a review of the Petition and the arguments advanced by Petitioners in support, reveals that the position presented by Petitioners both on appeal and now before this Court was precisely the issue properly rejected by the Tenth Circuit Court of Appeals – whether a communication that involves an outside investigative agency is constitutionally protected simply because the communication was not internal. The source of this newly found First Amendment analysis is undefined and unsupported.

Petitioners, in essence, argue that the content and context of their communications with outside investigative agencies is irrelevant in determining whether their speech is to be afforded constitutional protection. Rather, Petitioners argue that the identity of the individual(s) to whom their communications were directed, i.e., an outside agency, is the sole determinative factor of whether their speech is afforded constitutional protection. (Pet. 19-20, 28). In other words, under Petitioners' analytical framework, if accepted, a public employee's external communications are entitled to greater constitutional protection than internal communications. This Court has refused to recognize such an artificial and arbitrary

distinction, and Petitioners candidly admit that such a position is infirm and legally unsupported. (Pet. 12). Yet, this is precisely the argument advanced by Petitioners.

Simply because an employee speaks at work does not mean that the speech is unprotected. *See Garcetti*, 547 U.S. at 420-21. Conversely, simply because an employee's speech occurs outside the workplace does not mean that the speech is constitutionally protected. *See City of San Diego, California v. Roe*, 543 U.S. 77 (2004) (holding that police officer's speech outside workplace was not constitutionally protected and did not require *Pickering* balancing). The location where the speech at issue occurs, i.e., inside the workplace versus outside the work place, is not dispositive of whether the speech is protected under the First Amendment. *Garcetti*, 547 U.S. at 420.

Respondents do not suggest, and the Tenth Circuit did not hold in affirming summary judgment in this case, that whether communications are internal or external is not a factor to be considered in conducting the official duties analysis. To the contrary, the Tenth Circuit in *Casey v. West Las Vegas Indep. Sch. Dist.*, 473 F.3d 1323 (2007) recognized that internal and external communications – concerning identical subject matter – could be both protected speech and unprotected speech.

In *Casey*, the superintendant of the West Las Vegas School District and chief executive officer of the district's Head Start program complained to the

school board as well as federal agencies that a significant percentage of families enrolled in the Head Start program exceeded the federal income guidelines. Casey also complained to the school board as well as the state attorney general's office that the school board's meeting practices violated the New Mexico Open Meetings Act. The Tenth Circuit held that Casey's communications both with the school board and with outside federal agencies regarding the lack of compliance with federal regulations were made pursuant to her official job duties as CEO of the Head Start program, and therefore, were not protected. The court further recognized that Casey's internal complaints to the school board regarding the Open Meetings violations were made pursuant to her official duties; however, her complaints to the attorney general's office regarding this same subject matter were not made pursuant to her official duties and were protected under the First Amendment.

In analyzing Casey's speech, the Tenth Circuit recognized that the critical inquiry is the nature, substance and purpose of the communications by the public employee in relation to their job duties. *Casey*, 473 F.3d at 1329-30. The Tenth Circuit outlined the framework for analyzing speech by public officials in light of *Garcetti* in both *Casey* and *Green v. Bd. of County Comm'rs*, 472 F.3d 794 (10th Cir. 2007). This framework consists of looking at (1) the content of the particular speech at issue; (2) the scope of the employee's designated job duties; and then, (3) an assessment as to whether the speech at issue stems

from the types of activities the employee is paid to do. This approach is appropriate under both *Garcetti* and traditional First Amendment analysis.

Despite the addition of the official duties analysis occasioned by *Garcetti*, First Amendment jurisprudence has historically required courts to determine whether an employee spoke as a citizen on a matter of public concern. *See Connick*, 461 U.S. at 1690. Traditionally, in order to determine whether a public employee spoke on a matter of public concern, the inquiry focused on the content, form and context of the employee's speech in light of the entire record. *Id.* Since *Garcetti*, lower courts have employed this same analysis – content, form and context – to determine whether an employee speaks pursuant to his or her official job duties. *See Boyce v. Andrew*, 510 F.3d 1333 (11th Cir. 2007).

Casey recognizes that whether the communication at issue is internal or external is but one of a myriad of factors analyzed in considering whether the speech occurred pursuant to an employee's official duties. 473 F.3d at 1329-30. As Petitioners recognize, *Casey* "is perhaps the most instructive opinion from any circuit addressing *Garcetti's* job duty standards for assessing protected speech of public employees." (Pet. 37). Yet, Petitioners would ignore the teachings of *Casey* and *Garcetti* and instead focus the inquiry on an artificial distinction between internal and external communications.

In support of this interpretation, Petitioners contend the approach taken by the Tenth Circuit effectively strips a police officer witnessing physical abuse of an arrestee of the protections afforded by the First Amendment in a civil rights investigation by the Justice Department. This argument highlights the fundamental flaw underlying Petitioners' analysis of this decision as well as the decisions of various other circuit courts applying *Garcetti*. Petitioners would protect such communications simply because the communication involved an outside agency.

However, under *Garcetti* and its progeny, the municipal police officer's communications with the FBI or Justice Department are not protected simply because they involved outside agencies. Rather, the communication would be protected because it did not occur pursuant to the police officer's official duties. Municipal police officers' official duties do not include the investigation or enforcement of federal or state civil rights legislation. Therefore, a police officer who communicates with the Justice Department or the FBI would enjoy the same constitutional protections as any other citizen (including the garbage truck driver or the resident as posited by Petitioners in their hypothetical discussion) who may witness such an event and provide information to the authorities investigating a civil rights violation.

To the contrary, a municipal police officer's official duties do generally include the investigation and enforcement of alleged violations of state and municipal criminal statutes. Petitioners concede that

their job duties consist of making arrests and investigating criminal conduct, including internal affairs investigations involving potentially criminal conduct, including internal affairs investigations involving potentially criminal conduct of other police officers. The fact that an officer speaks with outside agencies pursuant to these official job duties does not ensconce their communications with constitutional protection under the First Amendment.

The Third Circuit refused to recognize an arbitrary distinction between internal and external communications in *Foraker v. Chaffinch*, 501 F.3d 231, 240-41 (3rd Cir. 2007) (holding that state troopers' communications with state auditor investigating closure of firing range due to health and safety issues fell within scope of official duties and were not protected). Even those cases that have held that communications with outside agencies are protected recognize that the proper inquiry focuses on the nature of the plaintiff's job duties in relation to the communication and not the nature of the agency with whom the communications are made. *See Freitag v. Ayers*, 468 F.3d 528 (9th Cir. 2006) (holding that female correction officer's complaints of sexual harassment to state senator and office of inspector general did not fall within her official job duties).

Petitioners cite to a plethora of decisions from other circuits and suggest that that the Tenth Circuit's decision in this case represents an excessive expansion of the official duty analysis set forth in *Garcetti*. Most notably, Petitioners cite the Fifth

Circuit's opinion in *Davis v. McKinney*, 518 F.3d 304 (5th Cir. 2008) and the Eighth Circuit's decision in *Lindsey v. City of Orrick*, 491 F.3d 892 (8th Cir. 2007) in support of their broad proposition. However, Petitioners' argument fails to find support in either of these decisions.

Although the Fifth Circuit did note that external communications are ordinarily made as a citizen, the Fifth Circuit recognized that, despite this general rule, it was necessary to look at the employee's role in relation to their job duties to determine whether the communications are protected. *Davis*, 518 F.3d at 314. In *Davis* the court held the speech at issue was protected, but not because it was with an outside agency. Rather, the court relied on the fact that communicating with outside agencies was not within the plaintiff's job functions, and had not occurred in over twelve years plaintiff had held the position of auditor. *Id.* at 316.

Similarly, in *Lindsey*, the Eighth Circuit held that statements regarding sunshine law compliance by the public works director for the City of Orrick were protected under the First Amendment. In so holding, the court recognized that the public works director reported to the city council regarding public works issues; however, "there was no evidence [the director's] job duties even arguably included sunshine law compliance." *Lindsey*, 491 F.3d at 898. The court in *Lindsey* did not even address whether the statements at issue were internal or made to an outside agency.

As discussed *supra*, the record in this case leaves no doubt that Cheek and Doty spoke pursuant to their official duties as police officers and majors with the Edwardsville police department. Even under the narrow approach taken by the Fifth Circuit in *Davis*, the speech at issue in this case would still be without protection as Petitioners failed to establish that their speech did not occur pursuant to their official duties.

Petitioners' misapplication of *Garcetti* is further highlighted by Petitioners' statement that decisions by lower courts post-*Garcetti* represent an "unrecognizable constitutional stew" in no small part due to the majority's failure to specifically outline the analytical framework for the additional inquiry of job relatedness in *Garcetti*. What Petitioners perceive as incongruous and disparate results are not the result of any improper application of *Garcetti* by the lower courts or a lack of direction by this Court; rather, it is the "necessary product of the 'enormous variety of fact situations which critical statements by . . . public employees may be thought by their superiors to furnish grounds for dismissal." *Garcetti*, 547 U.S. at 418 (citing *Pickering*, 391 U.S. at 569).

Garcetti represented a fundamental and significant change in First Amendment analysis by requiring a determination at the outset of whether a public employee's speech was a result of their official duties. *Williams v. Dallas Indep. Sch. Dist.*, 480 F.3d 689 (5th Cir. 2007); *Casey*, 473 F.3d at 1328. If the answer to this question is yes, whether the speech

involved a matter of public concern becomes irrelevant and the speech is not protected. *Id.* Since *Garcetti*, circuit courts have repeatedly recognized that speech by public employees traditionally protected under the First Amendment was no longer subject to constitutional scrutiny if it was the result of an employee's official job duties. For example, exposing government inefficiency and misconduct have traditionally been matters of considerable significance. *See Garcetti*, 547 U.S. at 425. Since *Garcetti*, however, circuit courts have held that these traditional matters of public concern, although protected under traditional *Connick/Pickering* analysis, may no longer be protected speech by public employees if the speech is the result of the employee's official duties. *See e.g. Phillips v. City of Dawsonville*, 499 F.3d 1329 (11th Cir. 2007).

While these results may seem incompatible with long standing First Amendment jurisprudence, this Court recognized that such inequities and irregularities might occur. *Garcetti*, 547 U.S. at 425. In doing so, this Court stated:

> The dictates of sound judgment are reinforced by the powerful network of legislative enactments – such as whistleblower protection laws and labor codes – available to those who seek to expose wrongdoing. . . . These imperatives, as well as obligations arising from any other applicable constitutional provisions and mandates of criminal and civil laws, protect employees and provide checks on supervisors who would

> order unlawful or otherwise inappropriate actions.

Id.

Such safeguards were available to Petitioners and this Court need not create the superficial distinction between internal and external communications urged by Petitioners in this matter. Such a distinction is neither necessary nor supported in First Amendment jurisprudence.

III. The Court of Appeals properly reviewed the issues presented in this matter.

The final issue raised by Petitioners in support of their Petition is that the Tenth Circuit failed to give proper consideration to the record before the court and the arguments raised by Petitioners on appeal. Apparently, this argument is erroneously premised on the underlying assumption that if the Court of Appeals would have reviewed the entire record it would have reached a different conclusion. In essence, Petitioners cry foul because they are unhappy with the result and decisions both at the district court and at the Court of Appeals.

However, as discussed in detail, *supra*, the record in this case establishes that Cheek and Doty spoke with investigators from the attorney general's office pursuant to their official duties. This result is supported not only by Tenth Circuit precedent but also this Court's decision in *Garcetti*. When an employee is

simply performing his or her job duties, there is no competing balance between the employee's speech and its consequences; therefore, strict scrutiny of the speech at issue is not necessary. *Garcetti*, 547 U.S. at 423. To hold otherwise would be to demand permanent judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of federalism and the separation of powers. *Id.*

Petitioners' additional argument that the Court of Appeals substituted an inferior argument for the argument actually presented by Petitioners is also unavailing. As discussed *supra*, Petitioners both at the court of appeals and now before this Court argued that their communications are protected because the communications were with an outside agency. The Court of Appeals properly rejected this argument as the records reveals that Petitioners' communications, both internal and external, were consistent with and the result of their official duties.

Contrary to Petitioners' position, the Court of Appeals considered the arguments of Petitioners and rejected those arguments. In affirming the judgment of the trial court, the court of appeals specifically stated in its order: "As for plaintiffs' remaining arguments, we have carefully considered them in light of the record on appeal, the parties' brief and the relevant law . . . we conclude that plaintiffs have not identified any reversible error in this case." The court of appeals, pursuant to its constitutional mandate weighed all the issues and arguments on appeal, and

correctly found that summary judgment was proper based upon existing law. Simply because Petitioners disagree with the result does not establish that the court of appeals abdicated its constitutional duty to review the record.

CONCLUSION

Petitioners have failed to demonstrate that the decision of the court of appeals is erroneous, misapplies the law or is inconsistent with recognized constitutional principles. Therefore, the Petition should be denied.

Respectfully submitted,

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and

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